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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 LINDSEY KAE SCHAEFER,

12 Plaintiff,

13 vs.
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16 SAN DIEGO CORNERSTONE
17 MORTGAGE; INDYMAC FEDERAL
18 BANK, F.S.B.; ONEWEST BANK, FSB;
19 FDIC; et al.,

20 Defendants.

CASE NO. 09-CV-978 JLS (CAB)

**ORDER: (1) GRANTING IN PART
AND DENYING IN PART
DEFENDANT'S REQUEST FOR
JUDICIAL NOTICE, (2)
GRANTING IN PART AND
DENYING IN PART
DEFENDANT'S MOTION TO
DISMISS, AND (3) DENYING
MOTION TO EXPUNGE LIS
PENDENS**

(Doc. Nos.19 & 20)

21 Presently before the Court are Defendant OneWest Bank, FSB's motion to dismiss the Second
22 Amended Complaint¹ and request for judicial notice. (Doc. Nos. 19 & 20.) Also before the Court is
23 Plaintiff's opposition to this motion.² (Doc. No. 22.) For the reasons stated, Defendant's request for
24 judicial notice is **GRANTED IN PART AND DENIED IN PART** and its motion to dismiss is
25 **GRANTED IN PART AND DENIED IN PART.**

26 ¹ Defendant alternatively asks this Court to grant summary judgment on these claims. The
27 Court finds that it would be premature to consider granting summary judgment at this time. Therefore,
the motion is **DENIED WITHOUT PREJUDICE** to the extent it seeks summary judgment.

28 ² Plaintiff's opposition was filed late per the Court's scheduling Order. (Doc. No. 21.)
Because justice so requires, it will be considered.

BACKGROUND

Plaintiff Lindsey Kae Schaefer owns the single family residence located at 4702 Morning Canyon Road in Oceanside, California. (Doc. No. 15 (SAC) ¶ 2.) Plaintiff alleges that she executed a loan “between January 1, 2003 and December 21, 2007” secured by the above-named property. (*Id.* ¶¶ 2–3, 8.) Defendant currently either owns or services this loan. (*Id.* ¶ 3.) In December 2008, Defendant initiated non-judicial foreclosure on the property. (*Id.* ¶¶ 6.)

Plaintiff brings three causes of action against Defendant. First, she alleges that Defendant violated the Perata Mortgage Relief Act, California Civil Code § 2923.5, because it did not contact Plaintiff “to discuss her financial situation or explore options to avoid foreclosure.” (*Id.* ¶¶ 7–11.) Second, Ms. Schaefer asserts that Defendant violated the federal Truth In Lending Act (TILA) by understating finance charge and the amount financed. (*Id.* ¶¶ 12–19.) Finally, Plaintiff seeks relief under the California Unfair Business Practices Act, California Business and Professions Code § 17200, *et seq.*, for the actions and statutory violations set forth within the complaint. (*Id.* ¶¶ 20–24.) For relief Plaintiff requests that Defendants be enjoined from foreclosing on her property, actual damages, restitution and disgorgement, and attorneys’ fees. (*Id.* at 5–6.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, – US — , 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 129 S. Ct. at 1949

1 (citing *Twombly*, 550 U.S. at 557).

2 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
3 as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at
4 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled “allow[] the
5 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,
6 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be
7 probable, but there must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*
8 Facts “‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to relief.
9 *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal
10 conclusions” contained in the complaint. *Id.* This review requires context-specific analysis involving
11 the Court’s “judicial experience and common sense.” *Id.* at 1950 (citation omitted). “[W]here the
12 well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the
13 complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

14 ANALYSIS

15 I. Defendant’s Request for Judicial Notice

16 At the outset, the Court addresses Defendant’s request for judicial notice. (Doc. No. 20
17 (RJN).) Defendant asks this Court to consider four documents when deciding the motion to dismiss.
18 Although a court “may generally consider only allegations contained in the pleadings, exhibits
19 attached to the complaint, and matters properly subject to judicial notice” when deciding a motion to
20 dismiss, it “may consider a writing referenced in a complaint but not explicitly incorporated therein
21 if the complaint relies on the document and its authenticity is unquestioned.” *Swartz v. KPMG LLP*,
22 476 F.3d 756, 763 (9th Cir. 2007) (citations omitted). Plaintiff has not opposed the consideration of
23 these documents.

24 The Court finds that Exhibits A, B, and D, are capable of being judicially noticed as they have
25 been recorded in the official public records of the San Diego County Recorder’s Office and are
26 undisputed. However, Exhibit C is not referenced in the complaint such that it would be properly
27 considered in a Rule 12(b)(6) motion. This exhibit, rather, is substantive evidence more properly
28 considered on a motion for summary judgment. Therefore, Defendant’s request for judicial notice is

1 **GRANTED** as to Exhibits A, B, and D, and **DENIED** as to Exhibit C.

2 **II. PERATA MORTGAGE RELIEF ACT**

3 Plaintiff's first cause of action is under the Perata Mortgage Relief Act, California Civil Code
4 § 2923.5. In relevant part, the Perata Act requires a "mortgagee, beneficiary, or authorized agent [to]
5 contact the borrower in person or by telephone in order to assess the borrower's financial situation and
6 explore options for the borrower to avoid foreclosure." Cal. Civ. Code § 2923.5(a)(2). According to
7 the Complaint, Defendant did not "contact[] the plaintiff to discuss her financial situation or explore
8 options to avoid foreclosure." (SAC ¶ 10.)

9 Defendant argues that the Court should dismiss this claim because, despite her allegations,
10 Plaintiff was actually contacted. (Memo. ISO Motion at 6–7.) They base this assertion on Exhibit C
11 to the request for judicial notice, a declaration that Defendant contacted Plaintiff in compliance with
12 section 2923.5. However, the Court has already stated that this is not properly considered in deciding
13 whether to dismiss this case. Moreover, the Second Amended Complaint directly disputes the
14 assertions contained within the declaration. Therefore, Defendant has not carried its burden to show
15 that the first cause of action fails to state a claim and its motion is **DENIED** as to this claim.

16 **III. TRUTH IN LENDING ACT**

17 Plaintiff's second cause of action arises under the Truth In Lending Act (TILA) and Regulation
18 Z of that Act. (SAC ¶ 15.) Plaintiff alleges that Defendant understated the finance charge and amount
19 financed, which means that defendant "fail[ed] to clearly, conspicuously, and/or accurately disclose
20 the terms of the loan to Plaintiff." (*Id.* ¶ 17.) In its opposition, Plaintiff acknowledges that this claim
21 must be dismissed. (Opp. at 3.) Therefore, the Court **DISMISSES** this claim **WITH PREJUDICE**
22 as time barred.

23 **IV. CALIFORNIA UNFAIR BUSINESS PRACTICES ACT**

24 Finally, Plaintiff raises a claim under the California Unfair Business Practices Act. Cal. Bus.
25 & Prof. Code § 17200, *et seq.* She alleges that by violating the Perata Act Defendant engaged in
26 unfair business practices. (FAC ¶¶ 20–24.) As a result, she "suffered a loss of money and suffered
27 injury in fact." (*Id.* ¶ 23.)

28 Defendant argues that this claim is "nothing more than labels and conclusions." (Memo. ISO

1 Motion at 10.) Further, it claims that neither the first nor the second cause of action state a claim.
2 Therefore, Defendant believes that this claim must be dismissed.

3 However, the Court has already found that the first claim survives dismissal. In stating a
4 section 17200 claim, a Plaintiff may base its claim on a violation a separate law. *See Cal-Tech*
5 *Commc'n, Inc. v. Los Angeles Cellular Tel. Co.*, 973 P.2d 527, 539–40 (Cal. 1999). Therefore,
6 because Plaintiff has stated one claim which survives dismissal, her Unfair Business Practices Act
7 claim cannot be dismissed. Therefore, the motion to dismiss is **DENIED** as to this claim.

8 **V. MOTION TO EXPUNGE LIS PENDENS**

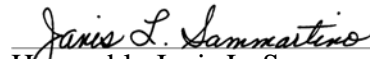
9 Finally, Defendant requests that the Court order the lis pendens in this case expunged. (Memo.
10 ISO Motion at 11.) However, since two of Plaintiff's three claims survive, the motion to expunge
11 must be **DENIED**.

12 **CONCLUSION**

13 For the reasons stated, Defendant's motion to dismiss is **GRANTED IN PART** and Plaintiff's
14 claim for relief under TILA is **DISMISSED WITH PREJUDICE**. Defendant's motion is **DENIED**
15 **IN THE REMAINDER**. The request to expunge the lis pendens is also **DENIED**.

16 IT IS SO ORDERED.

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18 DATED: June 21, 2010

19 
20 Honorable Janis L. Sammartino
21 United States District Judge
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